



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 338 OF 2013

REPUBLICAPPLICANT

VERSUS

KENYA CIVIL AVIATION AUTHORITYRESPONDENT

Ex-parte

FIVE FORTY AVIATION LIMITED

JUDGEMENT

1. The Applicant, Five Forty Aviation Limited is a limited liability company registered in Kenya under the Companies Act, Cap 486 Laws of Kenya. It is in the business of passenger and commercial air operations in Kenya and the rest of the Eastern Africa region. The Respondent, Kenya Civil Aviation Authority (KCAA) is a statutory body created under Section 3 of the Kenya Civil Aviation Act, 2013 charged with the responsibility for, *inter alia*, the licensing of air services, the safety, security, economic and technical regulation of civil aviation.

2. Through the notice of motion application dated 16th October, 2013 the Applicant prays for orders as follows:

“1. THAT an Order of certiorari do issue removing to the High Court for the purpose of quashing the decision of the Director General of Kenya Civil Aviation Authority dated 24th July, 2013 imposing a fine of Shs.400,000/- further to an alleged infringement notice under Section 39(3) Civil Aviation Act, 2013 and the decision of 20th August, 2013 dismissing the Ex parte Applicant’s appeal and confirming the decision of 24th July, 2013.

2. THAT an Order of certiorari do issue removing to the High Court for the purpose of quashing the decision of the Director General of Kenya Civil Aviation Authority dated 20th August, 2013 dismissing the Ex parte Applicant’s appeal and confirming the decision of 24th July, 2013.

3. THAT an Order of Prohibition do issue prohibiting the Director General of Kenya Civil Aviation Authority either by himself or through his delegates from implementing, executing, and/or doing anything whatsoever pursuant to the decisions dated 24th July, 2013 and 20th August, 2013.

4. THAT the Respondent be ordered to pay the costs for this application.

5. THAT the Honourable Court do grant further or any other order that it would deem fit in the circumstances.”

3. The application was supported by the statutory statement and the verifying affidavit of Nixon Ooko dated 26th September, 2013. It was also supported by a further affidavit sworn by Nixon Ooko on 20th November, 2014.

4. The Applicant's case is that by an agreement dated the 5th June, 2013, it leased aircraft Model CRJ-100 ER, Serial Number 7011, Registration 5Y-CCL from Avmax Aircraft Leasing Inc. The said aircraft will hereafter be simply referred to as the Aircraft. The Applicant duly presented the Aircraft to the Respondent for technical and identification evaluation as required by the law.

5. It is the Applicant's case that the Respondent duly evaluated the Aircraft by taking it through all the procedures set by the law and found it to be technically sound and thus airworthy. The Respondent thereafter issued the Applicant with a Certificate of Airworthiness having also reviewed Certificate of Release of Service and Certificate of Registration.

6. The Applicant avers that upon leasing of the said Aircraft it insured it on the 11th June, 2013. After going through all the technical processes and having been issued with a Certificate of Airworthiness and having put an insurance cover in place the said Aircraft was ready to be included in the Applicant's Air Operator Certificate (AOC) as required under Regulation 22(3) of the Civil Aviation (Air Operator Certification and Administration) Regulations, 2013 (the "Regulations").

7. The Applicant contends that the KCAA is mandated to authorize the flying of any aircraft in the Kenyan airspace and it is mandatory for all air operators to first submit to the said Authority a flight plan before their aircrafts can be allowed to take-off from any airport or airstrip within the country. According to the Applicant, on 20th June, 2013 it duly prepared flight plans which included the Aircraft. The plans were presented to the Respondent at Jomo Kenyatta International Airport and the Aircraft was authorized to commence its first commercial flight. The Respondent was thereafter presented with flight plans on diverse dates which flight plans included the Aircraft. The process was carried out from the 20th June to 18th July, 2013.

8. On or about the 18th July, 2013 the Applicant having presented its flight plans as required and having had the said Aircraft ready to take-off with passengers from Jomo Kenyatta International Airport, the Aircraft was abruptly and without any notice denied permission to fly. This action made the Applicant to incur substantial financial losses and also suffer damage to its reputation.

9. The Applicant states that on 19th July, 2013 one R K Kingori writing on behalf of the Director General of the Respondent gave it seven working days to explain in writing why it was flying an unauthorized aircraft in commercial operations contrary to Regulation 22 of the Regulations. According to the Applicant, when the Aircraft was grounded its Director of Operations Mr Nixon Ooko went to enquire at the Respondent's office as to the reasons for the grounding of the Aircraft so as to adequately respond to the notice.

10. Before the Applicant could respond to the notice, and before the seven days had expired, the Director General of KCAA wrote to the Applicant on 24th July, 2014 imposing a fine of Kshs.400,000/- threatening criminal prosecution if the fine was not paid within twenty eight days from the date of the notice. The Applicant being dissatisfied with the decision of the Director General and in compliance with the relevant law, appealed to the same Director General under Section 39(4) of the Civil Aviation Act, 2013 but the appeal was rejected through a letter dated the 20th August, 2013.

11. It is the Applicant's case that the Director General failed to adequately address his mind to the appeal and was also sitting on appeal against his own decision. The Applicant contends that although

a second appeal was available under Section 39(6) of the Civil Aviation Act, 2013 the same could not be pursued as the Tribunal tasked with the hearing of the appeal has never been set up hence the decision to institute these proceedings.

12. According to the statutory statement the Applicant therefore seeks relief on the grounds that:

“23. The action by the Director General of KCAA in taking a decision without giving the Applicant an opportunity to defend itself amounted to condemning the Applicant without being accorded an opportunity to be heard thus infringing on the rules of natural justice.

24. The Director General had no jurisdiction under the law either directly or through a delegate, which in this case was Mr. Kingori, to issue all the notices or to impose the punishment meted out to the Applicant.

25. The Applicant was further fined by the Respondent for an offence that does not fall within the Regulations named in the notice as the law under which the action was taken does not require the formal inclusion of an aircraft into an operator’s fleet.”

18.The Respondent opposed the application through the replying affidavit of the Chief Flight Operations Inspector, Raphael King’ori. The Respondent’s case is on 10th June, 2013 it received an application for approval of the lease between the Applicant and AVMAX Aircraft Leasing Incl. Pursuant to its mandate under the Regulations, the Respondent on 19th June, 2013 requested the Applicant to provide a valid insurance certificate and a certificate of registration for the Aircraft in order to enable the Respondent process the application for approval of the lease. The Respondent subsequently approved the lease for a period of one year with effect from 3rd July, 2013, subject to specified conditions among them that the Aircraft must be operated only upon satisfying all the technical fitness and operational requirements of the Respondent.

19.It is the Respondent’s case that on 18th July, 2013 it came to its attention that the Applicant had been flying the Aircraft in Reduced Vertical Separation Minimum (RVSM) Airspace without the necessary approval thus compromising the safety of the Aircraft and that of other users of the said Airspace. Further, the Respondent discovered that the Applicant had effective 20th June, 2013 been negligently and illegally utilizing the Aircraft on commercial operations out of the Jomo Kenyatta International Airport in Nairobi without the same having been approved for inclusion into its Operations Specifications.

20.According to the Respondent, the Applicant’s actions placed the passengers of the Aircraft and the general public at risk as the Aircraft had not been inspected for approval and inclusion into the Applicant’s Operations Specifications. As such the Respondent immediately moved to stop the illegal operation of the Aircraft until it was inspected and included in the Applicant’s AOC Operations Specifications. Consequently on 19th July, 2013 the Respondent wrote to the Applicant requesting it to immediately cease commercial operations on the Aircraft. The Applicant was also required to explain to the Respondent in writing why it had been operating the said Aircraft contrary to Regulation 22 of the Regulations. Further, the Applicant was required to explain to the Respondent in writing how the Aircraft had been operating in the RVSM Airspace without the required approval.

21.According to Raphael King’ori on 22nd July, 2013 one Nixon Ooko, a director of the Applicant, personally visited the Respondent’s offices and sought to discuss the contents of the letter dated 19th July, 2013. In the spirit of fairness and dialogue, the Respondent granted the aforementioned director audience and convened a meeting on the same day. The meeting which was chaired by the Respondent’s Director of Aviation Safety and Security Regulations was attended by the Respondent’s legal officer, the deponent of the replying affidavit (Raphael King’ori) and the Applicant’s said director.

22.At paragraph 23 of the replying affidavit Raphael King’ori avers:

“That at the said meeting on 22nd July 2013, the infringements of the *ex parte* Applicant regarding flying the RVSM Airspace without the Authority’s approval and the failure by the *ex-parte* Applicant to seek from the Authority, the inclusion of Aircraft Reg. 5Y-CCL in its *Operations Specifications* were discussed in detail and it was agreed as follows:-

“(a) That though the *ex parte* Applicant’s violations in flying Aircraft Reg. 5Y-CCL from 20th June 2013 and 14th July 2013 without its inclusion in the *ex parte* Applicant’s *Operations Specifications* were separate violations and would attract fines of up to Kshs. 300,000,000/-, the Authority was lenient and agreed that the series of violations would be treated as one violation and the *ex parte* Applicant would be fined Kshs. 400,000/- only

(b) The *ex parte* Applicant would regularize the operations of its Aircraft Reg. 5Y-CCL by paying for its inspection for inclusion into its *Operations Specifications*.”

23. According to the Respondent, immediately after the meeting, the Applicant proceeded to comply with the resolutions of the meeting and paid the requisite fees for the inspection of the Aircraft for inclusion in its *Operations Specifications*. Consequently, the Respondent inspected the Aircraft on the same day and after the inspection it was included in the Applicant’s *Operations Specifications*. Further, that on 30th July, 2013 the Respondent approved the operations of the Aircraft in the RVSM Airspace.

24. It is the Respondent’s case that as a result of the meeting held on 22nd July, 2013, the issue of the seven days notice given in the letter dated 19th July, 2013 became moot. Further, that the issuance of the Infringement Notice dated 24th July, 2013 was in exercise of the powers donated by Section 39(3) of the Civil Aviation Act, 2013.

25. The Respondent contends that the lease of the Aircraft by the Applicant was not approved as required by Regulation 23 until 30th July, 2013. Further, that the inspections and certificates issued in respect to the Aircraft did not mean that the Applicant had met all the technical fitness and operations requirements under the Regulations.

26. The Respondent also accuses the Applicant of dishonesty and refers to a letter dated 18th July, 2013 in which the requirements for addition of the Aircraft onto the Applicant’s AOC *Operations Specifications* were enumerated as follows:

“RE: AIRCRAFT TYPE ADDITION ONTO AOC OPERATIONS SPECIFICATIONS CRJ-100 REGISTRATION 5Y-CCL

Reference your letter dated 4th July 2013 (received on 16th July 2013) for which you have requested for type addition of the above aircraft onto Five Forty Aviation Ltd AOC *Operations Specifications*.

To facilitate in processing of your request, you shall be required to ensure that copies of the following documents are submitted to the Authority:

- 1. Certificate of Registration.**
- 2. Valid Certificate of Airworthiness**
- 3. Valid Certificate of Insurance.**
- 4. Valid Aircraft Certificate of Release to Service.**
- 5. Valid Aircraft Station Radio License.**

6. Valid Aircraft maintenance agreement with AMO.

7. Aircraft MEL/CDL.

8. Aircraft Flight Manual.

We shall be able to proceed with the type addition process once you have supplied us with the above listed documentation. The applicable fee for type addition is U.S Dollars 800 (eight hundred).”

27.It is the Respondent’s case that the Aircraft not having been included in the Applicant’s Operation Specifications until 22nd July, 2013 was not authorized to make any commercial flight between 20th June, 2013 and 14th July, 2013. On the Applicant’s claim that flight plans including the Aircraft had been filed, the Respondent contends that if indeed flight plans that included the Aircraft had been filed with the Air Navigation Services, such filing and permission to fly cannot in law validate or authorize the commercial flight of the Aircraft as it was not included in the Applicant’s Operations Specifications and was not allowed to make any flight until 22nd July, 2013.

28.In response to the Respondent’s replying affidavit Nixon Ooko, the Applicant’s director swore a further affidavit on 20th November, 2014. Through the said affidavit, the Applicant thrashes most of the averments in the Respondent’s replying affidavit. Mr Nixon Ooko averred that no meeting took place between him and the Respondent’s officers on 22nd July, 2013 and that is why no exhibit has been placed before the Court to show that such a meeting did indeed take place. He averred that the Applicant could not have accepted to be fined Kshs.400,000/= in regard to an Aircraft which had been in operation for about one month, had a Certificate of Airworthiness and its flight plans authorised by the Respondent.

29.A perusal of the material placed before the Court reveal that the parties concentrated on the merits of the Respondent’s alleged decision. They also argued at length as to whether the Applicant breached the Regulations. In my view, that was not necessary. The parties are not before this Court on appeal. They are here for a review of the decision of the Respondent.

30.The remit of judicial review was succinctly explained by Lord Diplock in the case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** as follows:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community ; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied

his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.....

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

31. In examining a decision in order to decide whether to issue judicial review orders, the Court will check out for illegality, irrationality and procedural impropriety. A judicial review court is ordinarily not concerned with the correctness of the impugned decision as such a task is ideally reserved for an appellate court. Of course the rationality test blurs the lines a bit as one cannot declare a decision irrational or unreasonable without considering the merits of the decision.

32. Upon reviewing the material before the Court, I find that the Applicant's case boils down to the allegation that the Respondent did not comply with the rules of natural justice.

33. The letter that triggered the events which led to these proceedings is dated 19th July, 2013. Through that letter, the Respondent communicated to the Applicant as follows:

“RE: UTILIZATION OF UNAUTHORIZED AIRCRAFT IN COMMERCIAL OPERATIONS

Reference the above subject matter.

The Authority notes with great concern of the continued commercial operation by Five Forty Aviation Ltd of an unauthorized aircraft (CRJ100 Reg. 5Y-CCL) for which a copy of the aircraft movement sheet is attached. The act by the company violates regulation 22 of the Civil Aviation (Air Operator Certification & Administration) Regulations, 2013.

As the Authority determines the course of action to take you are requested to:

- 1. Immediately stop further commercial operations using the subject aircraft, until such a time that the aircraft has been inspected and completely added onto your AOC – Operations Specifications including required operational approvals.**
- 2. Within seven (7) working days effective from date of this letter, respond in writing to the Authority as to why Five Forty Aviation Ltd has been operating the subject aircraft commercially knowing very well that the aircraft is not listed in the company's current Operations Specifications. An explanation as to how the aircraft had been operating in RVSM airspace without required operational approval shall be required as well.**

Overall, Five Forty Aviation Limited bears a primary responsibility of assuring a safe air transport to the members of public upon which criteria an Air Operator Certificate (AOC) was granted to the company.”

34. The letter does indeed meet some of the requirements of the rules of natural justice. It clearly stated the offence allegedly committed by the Applicant and gave the Applicant an opportunity to respond to the allegation within seven working days from the date of the notice.

35. The Applicant claims it was not heard. The Respondent's case is that the Applicant was heard on 22nd July, 2013. The Applicant asserts that the Respondent has not produced any evidence of such a hearing. The Applicant admitted that there was contact between its director Mr Nixon Ooko and the Respondent's officers after the issuance of the notice dated 19th July, 2013. According to paragraph 19 of Mr Nixon Ooko's verifying affidavit sworn on 26th September, 2013 that contact was for seeking clearer reasons as to why the Aircraft was grounded so that an adequate response could be made to the notice.

36. Two things emerge from this case. The first one is that although the Applicant had been given seven working days to respond to the allegations in writing, the Infringement Notice was issued on 24th July, 2013. This was the fifth day after the notice to show cause was issued on 19th July, 2013. The second thing to note is that although the Respondent refers to a meeting that took place on 22nd July, 2003 the evidence that such a meeting took place has not been placed before the Court.

37. In such circumstances, can anybody say that the Applicant was indeed heard? The Court of Appeal in **De Souza v Tanga Town Council [1961] E.A. 377** summarized the ingredients of the rules of natural justice as follows:

“The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of *University of Ceylon v Fernando (4)*, [1960] 1 All E.R. 631. I think that the principles, so far as they affect the present case, may be summarized as under:

- (1) If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed....**
- (2) If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue...**
- (3) In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means.....It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best.....A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant.....**
- (4) The person accused must know the nature of the accusation made....**
- (5) A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view....; and to make any relevant statement they may desire to bring forward.....**
- (6) The tribunal should see that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.....”**

38. From the affidavit evidence placed before this Court, there is no way that this Court can say that the Applicant was heard. There is even no evidence that it was given an opportunity to be heard as it was found guilty before the expiry of the period it had been given to show cause why it should not be punished. It was incumbent upon the Respondent to place evidence of the alleged hearing before the

Court. It did not do so and the only logical conclusion is that the Applicant was not heard. The letter dated 19th July, 2013 had asked the Applicant to respond in writing. How then could the Respondent have accepted an alleged oral defence on 22nd July, 2013?

39.The Applicant's appeal was rejected through a letter dated 20th August, 2013. That letter stated:

“RE: INFRINGEMENT NOTICE FOLLOWING BREACH OF CIVIL AVIATION STATUTE AND REGULATIONS

I refer to your letter of 6th August 2013 and the attached Memorandum of Appeal in response to the Infringement Notice Ref: KCAA/FOPS/3010/195 Vol II (196) dated 24th July, 2013

I have carefully perused your Memorandum of Appeal and the KCAA records. I note that you neither applied for nor were issued with authority to include aircraft registration number 5Y-CCL in your company's Air Operator Certificate (AOC) before commencing operations on 20th June, 2013, as required under Regulation 22 of the Civil Aviation (Air Operator Certification & Administration) Regulations, 2013. None of the enumerated certificates cited in your Memorandum of Appeal and as issued by KCAA amount to such authorization.

I have further confirmed that your company was granted an opportunity to defend itself before issuance of the Infringement Notice. Indeed, your Mr. Nixon Ooko attended a meeting on 22nd July, 2013, on behalf of your company, at KCAA offices. The meeting was convened specifically to discuss the non-authorized commercial operations undertaken by the aircraft 5Y-CCL between 20th June, 2013 and 18th July, 2013. The allegation that KCAA acted in contravention of Article 50 of the Constitution of Kenya 2010 and against the rules of natural justice is therefore baseless.

After consideration of the facts, I have concluded that your appeal raises no new issue and lacks merit. Accordingly, pursuant to and in accordance with the provisions of Section 39(5)(a) of the Civil Aviation Act 2013, I hereby find no ground in your appeal to reverse the action taken by the KCAA Inspector, as contained in the Infringement Notice dated 24th July, 2013.

For your reference, find attached copies of operations specifications for your AOC dated 28th June, 2012 and 22nd July, 2013.”

40.Although the letter rejecting the Applicant's appeal states that the Applicant was given an opportunity to be heard, there is no evidence to back up the claim. It is unimaginable that proceedings which ended up in a fine of Kshs.400, 000/= were never recorded. The proceedings must have been in writing and it was necessary for the Respondent to avail them to the Court in order to rebut the Applicant's claim that it was not heard. The seven days the Applicant had been given to provide its defence were not allowed to lapse so that it could be accused of failing to utilise the opportunity given to it to state its case.

41.Considering the evidence adduced before this Court, I agree with the Applicant that it was not given an opportunity to state its side of the story. The Respondent's Infringement Notice dated 24th July, 2013 is therefore called into this Court and quashed. The quashing of the said letter means that the decision of the Director General of the Respondent to reject the Applicant's appeal conveyed by the letter dated 20th August, 2013 amounts to nothing. However, for the Applicant's comfort, the decision contained in the letter dated 20th August, 2013 is also removed into this Court and quashed.

42.This decision does not bar the Respondent from executing its mandate in accordance with the law. In

Stephen S. Pareno v Judicial Service Commission [2014] eKLR (Civil Appeal No. 120 of 2004) the Court of Appeal noted that where a decision has been quashed a public body can commence fresh proceedings in respect of the same matter. In that case, after quashing letter dismissing the Appellant from the service of the Respondent, the Court observed that:

“For avoidance of doubt, the respondent is entitled in law to commence fresh disciplinary proceedings against the appellant, if it so decides, which complies with the statutory provisions.”

43. In view of the fact that the Respondent was executing its statutory mandate, I direct each party to meet own costs of this application.

Dated, signed and delivered at Nairobi this 19th day of May , 2015

W. KORIR,

JUDGE OF THE HIGH COURT